

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

5

KELLY BROTHERS SHEET METAL, INC.

10

and

CASE 12–CA–22495

GEORGE E. TWISS, An Individual

15

and

CASES 12–CA–22544
12–CA–22843

SHEET METAL WORKERS’
INTERNATIONAL ASSOCIATION
LOCAL UNION NO. 435, AFL–CIO

20

Rafael Aybar, Esq. , and
Jermaine Walker, Esq.,
Counsel for General Counsel.
Paul R. Beshears, Esq.,
Counsel for Respondent.

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DECISION

Statement of Cases

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A hearing was held in Tallahassee, Florida on June 11 and 12, 2003. I have considered the entire record and briefs filed by Respondent and General Counsel in reaching this decision.

JURISDICTION

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At material times Respondent has been a Florida corporation with an office and principal place of business in Tallahassee, where it has been engaged in the non–retail business of furnishing HVAC systems in new and renovated buildings. Annually, in conducting its business operations, Respondent purchases and receives goods valued in excess of \$50,000 at its Tallahassee facility directly from points outside Florida. Respondent has been an employer engaged in commerce within the meaning of the National Labor Relations Act (Act), at all material times.

LABOR ORGANIZATION

5 At material times the charging party (Union) has been a labor organization within the meaning of the Act.

SUPERVISORY ISSUE

10 Respondent admitted that Ronald (Bobby) Kelly, Jr., Max Rischar and Franklin Smith were supervisors and agents at material times. It denied that Charles Gray, Curtis Higbee and Gwynn (Tad) Lee were supervisors or agents.

15 Respondent worked on the Tallahassee Community Hospital (TCH) project. That work was on a six-story building. Respondent installed ductwork for the air conditioning system and their work started on March 4, 2002.

20 Franklin Smith testified that he has worked for Respondent for 12 years and is Respondent's superintendent. Bob Kelly is Respondent's president. Bobby Kelly is its project manager. Max Rischar is the job superintendent. Mark Miller is a supervisor. In July 2002 the Company employed about 100 employees. Employees included sheet metal mechanics and helpers and employees in the welding and service departments.

25 Smith gave orders to Max Rischar who, in turn, gave orders to Gray, Higbee and Lee. According to Smith, Gray, Higbee and Lee were responsible for assigning work to employees only under the directions of Max Rischar. Gray, Lee and Higbee were responsible for reporting to superiors the unsatisfactory work performance of employees. Those reports did not include recommendations of disciplinary action. Gray, Higbee and Lee did not have authority to fire or suspend employees. Nor did Gray, Lee and Higbee have authority to effectively recommend that an employee be fired or
30 suspended. On the average Gray, Lee and Higbee were each responsible for seven or eight employees. Franklin Smith and Bobby Kelly were responsible for hiring employees.

35 Smith testified that Tad Lee was a floor foreman. Charles Gray, Curtis Higbee and Laymon Miller¹ were also floor foremen and Gray, Lee and Higbee had similar job duties on the TCH project. Their jobs involved keeping the ductwork laid out ahead of the mechanics. Franklin Smith assigned Gray, Lee and Higbee their particular floor foreman jobs on TCH. Gray was assigned to the 3rd floor on the TCH project. Lee was assigned to the 2nd floor. Higbee was responsible for running the exhaust duct from the
40 first floor up through the sixth floor.

Franklin Smith testified that he or Max Rischar inspected the work of each crew. Gray, Lee and Higbee did not inspect employees' work. They did not evaluate employees' work. They did not have authority to direct employees to correct work. They

¹ As shown in the record Laymon Miller was a sheet metal mechanic and not a foreman at some times material herein.

did not transfer employees to other jobs unless directed to do so by Rischar. Gray, Lee and Higbee did not train employees on how to perform jobs safely. Nor did they review work for safety violations. Gray, Lee and Higbee also worked as mechanics. Each of them was paid on an hourly basis. Each made \$18 an hour, as did other mechanics.

5

Gray, Lee and Higbee may have tried to smooth out arguments between employees. None of the three could allow an employee to leave early nor could Gray, Lee or Higbee assign overtime. Gray, Lee and Higbee did not maintained employees' time or overtime. With the exception of Franklin Smith, all the others including Rischar punched the time clock.

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When recalled during Respondent's case, Franklin Smith testified that when he assigned work for Sunday, he told Curtis Higbee that if he needed any extra help to get Laymon Miller and anybody else that he needed to help him. He then told Laymon Miller that they would probably need to work Sunday if Higbee needed them.

15

Smith, Bobby Kelly and Bob Kelly attended supervisory meetings. No one else attended those meetings.

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George Twiss testified that while he was employed he worked with Foreman Charles Gray. Gray told Twiss what work he was to perform. Gray checked every project Twiss worked on. He told Twiss that he was happy with his work performance. Gray did not work alongside the employees. Twiss testified that the only physical work he saw Gray perform was drawing up fittings and taking measurements. Twiss estimated that drawing up fittings and taking measurements appeared to him to involve eight to ten percent of Gray's work time. During the remainder of his time Gray was away from the job or was involved in checking to make sure that projects in the different areas were getting done.

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Gray monitored Twiss's work. Gray did not talk to Twiss about safety matters and he did not assign overtime. Instead overtime was scheduled at the time Twiss started his job with Respondent.

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Curtis Higbee testified that he has worked for Respondent for over 9 years. Higbee denied that he worked as a foreman on the TCH project. He did work on that project from mid April 2002. He did have 3 helpers on the TCH project and he admitted that he sometimes spoke to employees about something they should not have been doing. He oversaw everything that went on in the mechanical rooms. He testified that even though George Twiss was not on his crew, he spoke to Twiss on a number of occasions. Higbee testified that on one occasion he told Twiss that "to get off his ass and get to working." Higbee testified that he also saw other employees out of their work areas. According to Higbee, he reported incidents to Rischar whenever he noticed employees sitting on their butts during working hours.

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Higbee directed work of his helpers. He told the two less experienced helpers how to glue, where to glue, when to glue ductwork and which sealant was for airtight seals. The third helper helped Higbee lay out and install hangers.

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Laymon Miller recalled that during the time he worked for Respondent he worked under Foreman Curtis Higbee only a couple of times when Higbee asked him to come in and work overtime on a Sunday. He never saw Higbee discipline anyone but Higbee told Miller that he had fired an employee from Tennessee and that he had had Brian Stokes' pay reduced. Higbee drove a company pickup truck.

10

During his first two or three weeks with Respondent, Laymon Miller worked with Foreman Tad Lee. Lee would give all the employees their work assignments at the start of each sift. Lee would look at the work and say it was all right or that something was wrong. Lee would sometimes work along with the other employees if someone was in a bind. Miller estimated that Lee worked with his tools about 20% of his time.

15

Tad Lee testified that he is currently a project superintendent for Respondent. In July 2002 he was a foreman on one end of the 2nd floor of the TCH project. In his job as foreman he was assigned to a particular area and told of his job by Franklin Smith or Max Rischar. Lee was responsible for insuring that all materials were available as needed on his job and that all the employees were performing their assigned duties. He oversaw the work of from 6 to 10 mechanics and helpers. Lee did not issue written disciplinary action.² He did verbally warn employees about their actions on the TCH project. Lee recalled that he issued those warnings each day.

20

25

Lee testified that Franklin Smith and Max Rischar would ask him about how particular employees were performing. He would advise Smith and Rischar whether he felt an employee was performing good work and that was part of his job. However, Smith and Rischar did not accept Lee's comments without making their own evaluations.

30

Tad Lee was responsible for assigning work to employees on a limited basis. He would lay out work ahead of the employees in order to accomplish the assignments given to him by Smith and Rischar. He would sometimes use his knowledge of an employee's experience in making specific assignments. He was responsible for inspecting the quality of each of his employees' work. When Lee felt work would not pass inspection by his superiors, he would direct the employee to correct problems. He would also watch for safety infractions and tell employees when they violated safety standards. He would sometimes reassign employees to work with others when an employee complained that he was working with someone that was too slow.

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² As shown herein Respondent did not issue written warnings during material times.

Lee estimated that he spent 60% of his time overseeing and directing the work of other employees.

5 Job Superintendent Max Rischar worked for Respondent on the TCH project from February until he had surgery on November 15, 2002. He testified that work assignments on the TCH project were made after the general contractor and Rock City Mechanical would tell Respondent each day what work was needed. Those two
10 contractors would tell Respondent about the pressure points and Rischar would radio his floor foremen regarding the necessary work assignments for that day. Frequently the general or mechanical contractor would radio Rischar regarding an immediate problem that required a work assignment. Rischar would then tell one of Respondent's floor foremen to get people over to handle that immediate problem.

15 **Conclusions:**
Credibility:

I have considered the demeanor of each witness and the full record. As shown above there were substantial conflicts in testimony regarding the duties of the foremen.
20 It is interesting to note that two witnesses, Superintendent Smith and Curtis Higbee, testified along the lines that the foremen had no supervisory duties. Others including Foreman Tad Lee and Job Superintendent Max Rischar as well as mechanics Laymon Miller and George Twiss testified to the effect that the foremen directed the work of employees on their respective crews.

25 According to Franklin Smith, the foremen, especially Gray, Lee and Higbee, did not engage in any supervisory activity. Those three, according to Smith, did not direct other employees' work, they did not independently assign work to the employees, they did not evaluate other employees' work, they did not effectively recommend disciplinary
30 action, nor did the three effectively recommend discharge. Instead, either Smith or Max Rischar preformed all those supervisory functions.

Smith did admit that Gray, Lee and Higbee were responsible to report unsatisfactory work of employees. Moreover, when recalled to testify by Respondent,
35 Smith testified that he did tell Higbee to select a crew including Laymon Miller, to work on a Sunday.

It was undisputed that Respondent's TCH project was a large job involving 6 floors in a hospital building as well as ductwork connecting the 6 floors. Nevertheless,
40 according to Smith, he and Rischar handled all the supervisory responsibilities.

It is undisputed that the general contractors expressed unhappiness with the Respondent's production on the TCH job. Despite that expression and Respondent's admitted hiring of additional employees, it appears from Smith's testimony that two
45 people, Smith and Rischar, handled direct supervision on all six floors of the TCH project.

Curtis Higbee's testimony included a denial that he worked as foreman. That conflicted with testimony Higbee gave in an affidavit to the NLRB (GCExh. 3). In the affidavit Higbee identified his job on the TCH project as foreman and testified that as foreman he was responsible for the mechanical room. Higbee admitted that he directed work of his helpers. Moreover, Higbee admittedly issued verbal warnings and he told George Twiss and other employees to get to work even though he was not their foreman.

Foreman Tad Lee, on the other hand, admitted among other things that he oversaw the work of from 6 to 10 employees, that he verbally warned employees each day, he evaluated employees and reported those evaluations to Rischar and Smith and he assigned work. That testimony as well as other testimony including that of George Twiss and Laymon Miller showed that the foremen assigned work, monitored work and instructed employees during their work.

In view of demeanor and the full record, I do not credit the testimony of Franklin Smith or Curtis Higbee unless the specific testimony did not conflict with credited evidence. I credit Laymon Miller and George Twiss. I was generally impressed with the demeanor and testimony of Tad Lee and I credit his testimony to the extent that it did not conflict with the testimony of Laymon Miller and George Twiss. I credit the testimony of Max Rischar to the extent it did not conflict with credited evidence.

Findings:

The testimony of Tad Lee showed that foremen were responsible for having all materials on the job as needed; foremen oversaw that all the employees were performing their assigned duties; foremen oversaw the work of employees; foremen issued warnings to employees on a regular basis;³ foremen informed their supervisors how specific employees were performing; foremen assigned work to employees on a limited basis; foremen would lay out work ahead of employees; foremen sometimes made specific job assignments to employees based on the foreman's knowledge of that employee's skills; foremen told employees to correct problems if the work did not pass the foreman's inspection; foremen watched for safety infractions told employees when they were in violation; and foremen reassigned employees when an employee complained that his co-worker was too slow.

Credited testimony including that of George Twiss and Laymon Miller, showed that the foremen initially assigned each employee work at the beginning of each shift; the foremen were the ones that instructed the employees which work to perform; the foremen monitored and checked all the employees' work and oftentimes told the employees whether their work was good or otherwise; and foremen Gray and Lee spent

³ Respondent project manager, Ronald Kelly, Jr. and Superintendent Franklin Smith testified that Respondent did not have a formalized discipline policy of issuing written warnings during the summer and fall of 2002. However, as shown herein, verbal warnings were issued by foremen including specifically Tad Lee and Curtis Higbee

about 10% to 20%⁴ of their total work time drawing up fittings and taking measurements or working with others when they got behind.

Legal Conclusions:

The National Labor Relations Act defines “supervisor” as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or responsibly direct them, or to adjust their grievances, or effectively to recommend such action. As noted above, the credited records shows that foremen on the TCH project including Gray, Lee and Higbee, had authority to assign and discipline employees and the foremen responsibility directed the work of others and adjusted their grievances. ***N.L.R.B. v. Kentucky River Community Care, Inc.***, 532 U.S. 706, 713 (2001); ***Beverly Enterprises***, 313 NLRB 491 (1993).

The credited evidence proved that TCH foremen exercised independent judgment in issuing the only disciplinary action exercised by Respondent short of suspension or discharge.⁵ ***Harborside Healthcare, Inc.***, 330 NLRB 1334 (2000). Tad Lee and Curtis Higbee admittedly issued verbal warnings to employees both inside and outside of in their respective crews. The testimony of Higbee showed that those warnings were issued without consulting higher level supervisors. Therefore, the foremen issued warnings through use of independent judgment. Moreover, the credited evidence showed that foremen exercised independent judgment in evaluating the work of crewmembers; assigning work with a mind toward the skills of the individual employee; directing employees to correct defective work; and in monitoring and overseeing the work of their crewmembers. Therefore, I find that Curtis Higbee, Tad Lee and Charles Gray were supervisors and agents of Respondent at material times.

UNFAIR LABOR PRACTICE ALLEGATIONS

Section 8(a)(1):

By Charles Gray:

Interrogation:

Threat of Discharge:

Impression of Surveillance:

When George Twiss started working for Respondent on August 24, 2002, his foreman, Charles Gray, asked him, “Are you from the Union?” Twiss did not answer that question. Instead he replied, “Man, I’m from the west side.”⁶ Gray then said that he had been a member of the union Local 85 in Georgia.⁷

⁴ Lee testified that he spent 60% of his work overseeing and directing the work of other employees.

⁵ Respondent did not issue written warnings during the summer and fall 2002.

⁶ Twiss was referring to the west side of Jacksonville, Florida.

⁷ Brian Harris was present during this conversation between Twiss and Gray.

George Twiss asked Charles Gray to sign a Union card on September 13, 2002. Gray replied *"Hell, no,"* and walked away. Then Gray came back and said to Twiss, *"Let me give you a hint. Max and Franklin know the names of everyone that was at that union meeting the other night. If we hear any talk going on about a union you will be fired and your check will be here in 10 minutes. We'll have your check here in ten minutes."*⁸ Twiss then heard Gray say into his cell phone, *"Max, we have to talk immediately."*

Brian Harris was also present during that conversation. Harris testified that Gray told Twiss that Max and Franklin said that they knew about a union meeting and that somebody was there and took names. Gray said that if there *"was any more talk about union on the job, that Franklin would have their check in ten minutes and run their butts off."*

Twiss had a second conversation with Charles Gray regarding the Union on September 13. Gray asked Twiss why he would want anybody to join a union since the union didn't have any work in Tallahassee.

Conclusions:

Credibility:

Charles Gray did not testify.⁹ In consideration of their demeanor and the entire record I credit the testimony of George Twiss and Brian Harris.

Findings:

The credited testimony shows that Charles Gray questioned George Twiss about whether he was from the Union and why he would want anybody to join a union. That testimony also showed that Charles Gray threatened Twiss that Respondent's supervision knew which employees had attended a union meeting and that Twiss would be fired if they heard any talk going on about a union.

By Franklin Smith:

Prohibited employees from discussing the Union:

Threat of Discharge:

Interrogation:

Counsel for General Counsel pointed to the incident of George Everett Twiss's discharge to support its allegation that Franklin Smith made comments in violation of section 8(a)(1). On September 14 shortly before he checked in on the TCH job, George Twiss was with Brian Harris and a few other employees. Franklin Smith said, *"Everett, you're fired. I'm not going to have you come on my job trying to recruit my men for the*

⁸ Max and Franklin are admitted supervisors Max Rischar and Franklin Smith.

⁹ Gray's October 24, 2002 affidavit was received in evidence. His testimony shows that he did have conversations with George Twiss about the union but Gray generally denied that he interrogated employees about their union sympathies, that he threatened any employee that he was being "surveilled" and that he threatened any employee with discharge for Union activities.

union on my time.” Twiss replied, “*Franklin, I haven’t been doing it on your time.*” Smith repeated, “*Well, you’re fired.*” Then Smith told Brian Harris to come over. Twiss stated that Brian did not belong to his union. Smith asked, “*Brian, do you belong to the union?*” Harris replied that he did not.

5

Brian Harris testified that as he and Twiss were going to their workstation, Franklin Smith yelled, “George Twiss.” Smith then told Twiss that he was fired and said it’s “*for promoting the union on my time.*”

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Franklin Smith testified that Charles Gray told him that Twiss was talking about the Union while at work. Smith testified that he told George Twiss that Twiss could not talk Union on Company time. Smith testified that he told Twiss that he did not care if Twiss talked to employees about the union before work time, break time, lunch or afternoon.

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**Conclusions:
Credibility:**

As shown herein, I was not impressed with the demeanor of Franklin Smith. As to the incident involving the discharge of George Twiss, I was more impressed with the testimony of Twiss and Brian Harris.

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Smith implied that Respondent had a rule against talking about the union on the job. However, the credited record did not show there was a non-discriminatory rule that would include a prohibition against talking about the union. The full credited record showed there was no rule against talking before the September 14 discharge of Twiss.

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I credit the testimony of George Twiss and Brian Harris and do not credit the testimony of Smith.

30

Findings:

The credited record showed that Respondent did not have a rule or rules against solicitation, talking or distribution before September 14. Nevertheless, the undisputed record shows that Franklin Smith told Twiss that he was discharged because he was recruiting for the Union.

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Smith was in effect telling employees that recruiting for the union while on the job was prohibited. In view of the record showing that Respondent had no rule against talking, solicitation or distribution before that comment, it is clear that Respondent was discriminatorily prohibiting the employees from discussing the union. Moreover, that evidence shows that Respondent did not differentiate between time involved in work and time on breaks and at meals.

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Smith's comments also included a threat that employees that recruited for the union while on the job would be discharged. Additionally, Smith questioned Brian Harris as to whether Harris was in the Union.

By Gwynn (Tad) Lee:

Solicited revocation of Union cards:

Interrogation:

By Curtis Higbee:

Solicited revocation of Union cards:

Interrogation:

Testimony including that of Tad Lee and Curtis Higbee showed that Lee and Higbee prepared union free cards¹⁰ and both Lee and Higbee distributed those cards and asked employees to sign and return those cards to them.

Around the end of October 2002 Tad Lee handed Laymon Miller a copy of General Counsel Exhibit 7. Lee said the he and Kelly Brothers weren't for the Union and didn't want it. Later, about the first of November, Curtis Higbee gave Miller a similar paper. Tad Lee gave employee Hank Reed a similar paper as he was clocking in or out, in October or November.

The paper given employees by Lee or Higbee, stated:

*THE EMPLOYEES OF KELLY BROTHERS SHEET METAL INC
WHO WISH TO REMAIN UNION FREE
I THE UNDER SIGNED HEREBY MAKE KNOWN THAT I WISH TO
NEGOTIATE ON MY OWN BEHALF DIRECTLY WITH
KELLY BROTHERS SHEET METAL INC.
FURTHERMORE, IF IN HAST I PREVIOUSLY SIGNED A UNION CARD
WITHOUT ALL THE FACTS I NOW DECLARE THAT DECISION NULL AND VOID
NAME _____ TEL NO _____
ADDRESS _____ CITY _____
STATE _____ ZIP CODE _____
DATE _____ (SIGN) _____*

There was no evidence that any employees requested assistance in revoking union authorization cards.

Conclusions:

Credibility:

There is no dispute regarding this matter. Lee and Miller admitted that the two of them created General Counsel Exhibit 7 and that the two of them distributed the union free cards to employees.

¹⁰ GCExh. 7.

Findings:

Unlike the situation where Respondent restricted and punished employees for engaging in pro-Union activity on the job, two supervisors distributed union free cards on the work site especially near the time clock. Higbee admitted that he passed out approximately 50 cards to employees and that around 42 or 43 employees returned signed union free cards to him.

By Ronald (Bobby) Kelly, Jr.:¹¹

Threatened loss of work and more onerous working conditions:

Laymon Miller and Hank Reed testified about a meeting near Respondent's shop around late November or early December. Miller, Reed and other employees were told to leave the TCH project and go back to the shop and clock out. About 50 to 60 employees returned to the shop. Miller testified that Bobby Kelly spoke to the employees. He told the employees that they were going to have a meeting about the union but since he couldn't speak about the Union on company property, the employees were to go across the street to the graveyard. Bobby Kelly spoke to the employees at the graveyard. He said that right now he could keep them working year around but if they went union he couldn't keep them working because there weren't that many union jobs around. Kelly told the employees that he had worked for a union before and that Kelly Brothers wasn't for the union. He wasn't for the union. Kelly said the only thing the union wanted was for the employees to give it their money.

TCH project manager, Ronald Kelly, Jr. admitted that he talked to employees about the union in the graveyard. He denied telling the employees that he could not keep them working year around if they went union. Kelly denied that he opposed the Union.

**Conclusions:
Credibility:**

In consideration of the demeanor of the witnesses and the full record I am convinced that Laymon Miller and Hank Reed testified truthfully regarding the graveyard meeting. I credit their testimony in that regard and do not credit the conflicting testimony of Ronald Kelly, Jr. The record showed that at the time of the meeting both Respondent in general and Kelly in particular, were opposed to the Union. In fact Kelly stated that he held the meeting off Company property in order to avoid any possibility the Union would be given equal time to speak to employees at the Company. I find Kelly's testimony that he did not oppose the Union was not believable and I do not credit his testimony, which conflicts with credited evidence.

¹¹ Respondent admitted that Kelly was its supervisor and agent.

Findings:

5 The credited testimony showed that Bobby Kelly threatened Respondent's employees with loss of job opportunities if they selected the Union.

Section 8(a)(1) Legal Conclusions:**Interrogation:**

10 As shown above Charles Gray and Franklin Smith questioned employees about the employees' support of the Union. Counsel for General Counsel also argued that Tad Lee and Curtis Higbee interrogated employees when the two of them distributed union free cards. I find that the actions of Lee and Higbee in that regard did not constitute unlawful interrogation. There was nothing in the union free cards or in the comments
15 made when those cards were distributed, that constituted illegal interrogation. However, as shown above, there were other instances of supervisors questioning employees about the Union.

20 As to those instances of questioning of employees, I shall consider whether Respondent's actions were unlawful. The Board recently considered whether interrogation was unlawful in **Westwood Health Care Center**, 330 NLRB 935, 939, 940 (2000):

25 *We agree with our dissenting colleague that the applicable test for determining whether the questioning of an employee constitutes an unlawful interrogation is the totality-of-the-circumstances test adopted by the Board in [Rossmore House](#), 269 NLRB 1176 (1984), affd. sub nom. [Hotel Employees Union Local 11 v. NLRB](#), 760 F.2d 1006 (9th Cir. 1985), and adhered to by the Board for the past 15 years. [FN16] We also agree that in analyzing alleged interrogations under the [Rossmore House](#) test, it is appropriate to consider what have come to be known as "the Bourne factors," so named because they were first set out in [Bourne v. NLRB](#), 332 F.2d 47, 48 (2d Cir. 1964). Those factors are:*

- 30 (1) The background, i.e. is there a history of employer hostility and discrimination?
 (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
 35 (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
 (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
 (5) Truthfulness of the reply.

40 Unlike our colleague, however, we note that these and other relevant factors "are not to be mechanically applied in each case." [269 NLRB at 1178 fn. 20](#). As the D.C. Circuit Court of Appeals has similarly noted, determining whether employee questioning violates the Act does not require "strict evaluation of each factor; instead, '[t]he flexibility and deliberately broad focus of this test make clear that the Bourne criteria are not prerequisites to a finding of coercive questioning, but rather useful indicia that serve as a starting point for assessing the 'totality of the circumstances.'" [Perdue Farms, Inc. v. NLRB](#), 144 F.3d 830, 835 (D.C. Cir. 1998),
 45 *940 quoting [Timsco, Inc. v. NLRB](#), 819 F.2d 1173, 1178 (D.C. Cir. 1987). In the final analysis, our task is to determine whether under all the circumstances the

questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.

5 As found above, Charles Gray questioned George Twiss on the first day Twiss worked, as to whether Twiss was from the union. Franklin Smith interrogated both George Twiss and Brian Harris as he discharged George Twiss. Smith said Twiss was recruiting for the Union at work and, thereby, questioned whether Twiss was actually
10 recruiting for the Union and when. Smith directly questioned Harris as to whether he was in the Union.

In regard to the Bourne factors, there was evidence that Respondent strongly opposed the Union; that Respondent, especially through its superintendent, Franklin Smith, sought information for use in determining whether employees should be
15 terminated; that one of the questioners was the superintendent of the entire TCH job and the other was a foreman directly over the employee questioned; and that both employees Twiss and Harris responded untruthfully when questioned about their union affiliation. Moreover, when considered against the "totality of the circumstances," it is apparent that the interrogations by Smith and Gray were coercive and constitute
20 violations of Section 8(a)(1) of the Act.

Threat of Discharge:

Threat of Loss of Job opportunities:

25 Foreman Charles Gray threatened employee George Twiss that he would be fired and his check would be there in 10 minutes if there were any talk about the Union. Franklin Smith discharged George Twiss and told Twiss in the presence of Brian Harris, that he was discharged because he was recruiting for the Union on Company time. Smith then asked Harris if he belonged to the Union. I find that Smith implied that he
30 would discharge Harris if he belonged to the Union. Smith also threatened that he would discharge employees for Union recruiting when he discharged Twiss. Additionally, Ronald Kelly, Jr. effectively told employees that he would keep them in work unless they selected the Union in which case he could not keep them working year around.

35 The Board has consistently found threats of loss of job opportunities or discharge, constitute Section 8(a)(1) violations. **Donal E. Hernly, Inc.**, 240 NLRB 840 (1979); **Sunnyside Home Care Project, Inc.**, 308 NLRB 346 fn. 1 (1992); **Wake Electric Membership Corp.**, 338 NLRB No. 32, slip op. 2 (2002). I find that Respondent engaged in unfair labor practices by threatening its employees with
40 discharge and by threatening its employees with loss of job opportunities.

Created the Impression of Surveillance:

5 Foreman Charles Gray told George Twiss that Max Rischar and Franklin Smith
knew the names of everyone that was at that union meeting.¹² Then Gray went on to
say that Twiss would be fired and his check would be delivered in 10 minutes if
Respondent heard of any union talk. The test for determining whether Gray's comment
constitutes an illegal impression of surveillance is whether the employee would
10 reasonably assume that their union activities were under surveillance. **United States
Coachworks, Inc.**, 334 NLRB 118 (2001).

Gray coupled his comments with a threat to discharge anyone talking about the
Union. Gray implied that Respondent knew something it had not learned through
15 observation of overt union activities.

The record showed that numerous employees had attended one or more union
meetings. Therefore, Gray's comments appeared to be true. In view of that evidence
and the full record, I find that Gray's comments did reasonably lead Twiss to believe the
employees' union activities were under surveillance and I find that Gray's comment
20 constitutes a violation of Section 8(a)(1).

Prohibited Employees from discussing the Union:

25 Counsel for General Counsel pointed to Superintendent Franklin Smith's
comments when he discharged George Twiss, as showing that Respondent unlawfully
prohibited employees from discussing the Union. The record showed that despite
Smith's comments to Twiss, employees were not otherwise prohibited from talking
about non-work related matters while at work. There was no evidence that Respondent
lawfully prohibited solicitation or distribution.

30 Franklin Smith stated in the presence of other employees that George Twiss was
discharged and that Smith would not allow Twiss to recruit his employees for the Union
while Twiss was on Smith's time.

35 The message was obvious. Smith was discharging Twiss because he felt Twiss
had discussed the union with other employees while at work. Its impact on other
employees was also obvious. Anyone that discussed the Union while at work ran the
risk of being treated like George Twiss.

40 Counsel for General Counsel pointed out several unlawful aspects of Smith's
comments. In the first place, it is usually unlawful to restrict employees from talking
about the Union when employees are not working and are otherwise free to discuss
non-work related matters. Smith's comments appeared to encompass all time at work
without regard to whether the involved employees were on break or were otherwise

¹² The record evidence showed that employees had attended a Union meeting before Gray made those comments.

engaged in free time activities.¹³ **Litton Microwave Cooking Products**, 300 NLRB 324 (1990); **Southeastern Brush Company.**, 306 NLRB 884 (1992).

Also, it is generally an unfair labor practice to prohibit employees from talking about the Union when employees are not prohibited from talking about other non-work related matters. **Waste Management of Palm Beach**, 329 NLRB No. 20 slip op. 4 (1999).

I find that Respondent engaged in unfair labor practice in violation of Section 8(a)(1) by unlawfully prohibiting its employees from talking about the Union.

Solicited employees to revoke their union cards:

As shown above Foremen Lee and Higbee prepared and distributed antiunion cards to employees. Those cards contained an indication that the signer was revoking previously signed union cards. In view of the fact that supervisors solicited employees to sign those cards, I find that action constitutes unlawful activity. Supervisors may not lawfully solicit employees to withdraw their union authorization cards. **Mohawk Industries, Inc.**, 334 NLRB No. 135 slip op. 2 (2001).

Here, not only were the antiunion cards prepared and distributed by supervisors, but, as shown herein, the cards were distributed on the TCH job. As shown above, on the other side of the coin, Respondent was holding out to employees advocating the Union that it prohibited their recruiting for the Union while at work.

The employees were told to sign the cards and return it to the foreman. I find those actions by Lee and Higbee constitutes additional violations of Section 8(a)(1).

Section 8(a)(3):

Discharge of George Everett Twiss:

George Twiss was discharged on September 14, 2002. Superintendent Franklin Smith said, *"Everett, you're fired. I'm not going to have you come on my job trying to recruit my men for the union on my time."* Twiss replied, *"Franklin, I haven't been doing it on your time."* Smith repeated, *"Well, you're fired."* Smith asked Brian Harris, *"Brian, do you belong to the union?"* Harris replied that he did not. Brian Harris testified in corroboration of Twiss's testimony.

Twiss had worked for Respondent as a sheet metal mechanic on the TCH project since August 24, 2002. His foreman was Charles Gray. There were anywhere from nine to thirteen employees on the 3rd floor including the foreman, while Twiss worked there. Twiss testified that on his first day on that job Charles Gray asked him where he was from. When Twiss replied he was from Jacksonville, Gray asked if he was from the

¹³ I do not credit Smith's testimony including his testimony that he restricted his prohibition to time other than break time and before and after work.

union. Twiss replied that he was from the west side of Jacksonville. During that conversation Gray told Twiss that he had been a member of Local 85 in Georgia.

Occasionally Twiss's work required him to go to other floors to get materials, supplies or to seek information from a supervisor. His co-worker, Sheet Metal Mechanic Brian Harris, also went to other floors to pick up materials, supplies or information. Occasionally Twiss and Harris ran those errands together but most of the time they made separate errand runs. On errands Twiss frequently talked with other employees regarding both work related and non-work related matters.

George Twiss has been a member of Local 435 since 1972. On three occasions while he was at work, Twiss solicited employees to sign Union authorization cards. Twiss attended a Union meeting in Tallahassee around September 5, 2002.

On the day before his discharge, Twiss asked foreman Charles Gray to sign a Union card. Gray replied "*Hell, no,*" and walked away. Then Gray came back and said to Twiss, "*Let me give you a hint. Max and Franklin know the names of everyone that was at that union meeting the other night. If we hear any talk going on about a union you will be fired and your check will be here in 10 minutes. We'll have your check here in ten minutes.*" Twiss then heard Gray say into his cell phone, "*Max, we have to talk immediately.*"

George Twiss had a second conversation with Foreman Charles Gray on the day before he was discharged. Gray asked Twiss why he would want anybody to join a union since the union didn't have any work in Tallahassee. Twiss replied that the Union had people that became members over there and they might have some work.

Sheet metal mechanic Brian Harris testified that he worked with Twiss while employed by Respondent on the TCH project. He testified that Twiss asked Foreman Charles Gray to sign a Union card shortly before lunch a couple days before Twiss was discharged. Gray "*kind of got excited and said no he didn't want to sign a card. And what made it anything that the union was coming to Tallahassee? There was no work.*"

Harris testified there was another conversation between Gray and Twiss that same day after lunch. Gray said "*that Max and Franklin said they knew about a union meeting and that somebody was there and took the names. If there was any more talk about the union on the job, that Franklin would have their check in ten minutes and run their butts off.*"

Franklin Smith testified that he talked with Charles Gray on the evening before Twiss was terminated. Gray told him that things would be better on the third floor if Twiss wasn't walking around talking and interfering with everybody. Gray said that Twiss was talking about the Union. The next morning Smith told Twiss that he had too many complaints on him, that he was interfering with other people working. Smith told Twiss that he didn't care if he talked about the union on his own time but not on company time. Smith told Twiss that he was letting him go.

Smith testified that he made the decision to discharge George Twiss. He based that decision on absenteeism, coming in late, being out of his workplace and interfering with other employees. Smith twice verbally warned Twiss about being out of his work area. He did not document those warnings.

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Franklin Smith testified that within a week of Twiss starting work, Foreman Charles Gray told Smith that Twiss was staying out of his work area and that Twiss was excessively slow on installation. Smith told Twiss that he was going to have to do better than what he was doing and that Twiss didn't have time to walk around and talk to and bother people. Franklin Smith told Twiss they were really pushed up there on that floor and he needed every man working and that at \$18 an hour he was expecting Twiss to improve his production.

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About a week later Smith found Twiss and two helpers not working. Smith told Twiss to go back to work. He told Twiss that he didn't need to be talking and they needed to be working. Smith testified that he told Twiss that he didn't care about him talking about the Union as long as it was before work time, break time, lunch or afternoon.

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Twiss testified that he had never been told of a rule that prohibited talking or that prohibited solicitation. Twiss was never disciplined while he worked for Respondent and he was never spoken to about being out of his work area. On one occasion, on September 12, Franklin Smith and Charles Gray talked to Twiss and Brian Harris about work performance. Smith told them that they needed to tighten up. Smith then said, "Well, don't get me wrong. You're doing a great job. Your work is fine. You just need to do a little bit more of it."

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Respondent also called Curtis Higbee. He testified that even though he did not work with George Twiss on the TCH project, he continually saw Twiss in areas other than Twiss's regular work area. Higbee testified that he usually saw Twiss out of his work area during the time after the lunch break. On those occasions Twiss was standing around talking to people. Higbee testified that he had no knowledge that Twiss had business-related reasons for being out of his regular work area on those occasion. On one occasion Higbee told Twiss that "he needed to get off his ass and get to working." Higbee told Max Rischar about that incident. According to Higbee, he reported all incidents to Rischar whenever he noticed employees sitting on their butts during working hours.

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Tad Lee testified that even though he was not Twiss's foreman, he did observe Lee occasionally out of his regular work area. On occasion Twiss was looking for material or supplies and Lee helped direct Twiss to the proper source but on other occasions Twiss was out of his work area with no work-related purpose. Lee testified that he didn't recall reporting Twiss being out of his work area to anyone because that "was so rampant among many individuals".

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Conclusions:
Credibility:

5 As shown above, I was not impressed with the demeanor of Franklin Smith. Moreover, his testimony did not square with the credited record and in some instances his testimony was inconsistent. For example General Counsel called Smith early in the hearing. At that time Smith testified that he cautioned George Twiss on one occasion about Twiss talking about the Union during work. When asked how he learned that
 10 Twiss was talking about the Union, Smith replied that several employees complained to him about Twiss talking about the Union while they were trying to work. Smith testified that none of those employees that complained to him was a foreman.

Respondent subsequently called Smith. At that time, while on cross-
 15 examination, Smith testified that Foreman Gray told him that Twiss was talking about the Union. Smith testified that Gray told him that during about the first week that Twiss was on the job. Counsel for General Counsel asked Smith if any other employees told him that Twiss was talking about the Union and he replied, "I can't recall."

20 I was more impressed with the testimony of Twiss and Brian Harris than that of Franklin Smith, Max Rischar and Curtis Higbee and I credit Twiss and Harris. I especially credit the testimony of Twiss and do not credit the contrary evidence in regard to Charles Gray's September 13 comments to Twiss regarding what would happen to Twiss if there was talk about the union. Gray did not testify and an affidavit
 25 from him contained only a blanket denial.

Finally, there was the question of what was Respondent's rule regarding talking while on the job. Smith implied that Respondent had a rule against talking on the job. However, there was no evidence to show that was the case. Instead, the full credited
 30 record showed there was no rule against talking before the September 14 discharge of Twiss. Employees routinely talked while on the job. I credit that testimony of Twiss and do not credit the testimony of Smith.

Findings:

35 The credited record showed that Respondent did not have a rule against solicitation, talking or distribution before September 14. Nevertheless, the undisputed record shows that Franklin Smith discharged Twiss on September 14 and told Twiss that his discharge was because he was recruiting employees for the Union on Smith's
 40 time.

George Twiss was involved in Union activity. He was a member of the Union and he solicited employees including Foreman Charles Gray to join the Union. Twiss's union activities were proximate in time to his discharge. On the day before he was discharged
 45 he asked Foreman Charles Gray to sign a Union card. After refusing to sign the card Gray returned and said to Twiss and told him that Respondent knew which employees had attended a union meeting and that Twiss would be fired and his check delivered in

10 minutes if there was union talk. Twiss overheard Gray say on his cell phone, "*Max, we need to talk immediately.*"

5 In considering whether the evidence supported General Counsel, I find that the record showed that Twiss was involved in Union activities; that Respondent knew he was involved in Union activities; that Respondent harbored Union animus; that Respondent discharged Twiss on the day following its determination that Twiss was recruiting for the Union; and that Respondent used pretext in trying to justify its discharge of Twiss.¹⁴ I find on the basis of the full credited record that Respondent was motivated to discharge George Twiss because of its Union animus.¹⁵

15 I shall consider whether the record showed that Twiss would have been discharged in the absence of Union activities. Respondent in its brief as well as during testimony at the hearing, contended that Twiss was discharged because of absenteeism, being out of his workplace and interfering with other employees' work. Respondent conceded that "the reason behind Mr. Twiss being out of his workplace and interfering with other employees' work was mostly due to his constant union solicitations."

20 As to absenteeism, Respondent argued that Twiss missed two and a half days work during the short time he worked for Respondent. Three people testified about Twiss's discharge. Those three witnesses were George Twiss, Brian Harris and Franklin Smith. None of those three recalled there being a mention of absenteeism as a reason for Twiss's discharge. I am convinced that absenteeism did not play any part in Respondent's discharge of George Twiss.

Respondent also argued that Twiss was discharged because he was frequently out of his work area interfering with other employees' work by talking about the Union.

30 Superintendent Franklin Smith, whose testimony was discredited, did testify that he told Twiss he was discharged. Smith testified that he told Twiss that Twiss was interfering with other people's work, that he did not care if Twiss talked union on his own time and that Twiss's work performance was not up to what it was supposed to be.

35 However, as shown above I credited testimony of George Twiss regarding the discharge incident. Twiss testified that Franklin Smith gave as the only reason Twiss was discharged, "I'm not going to have you come on my job trying to recruit my men for the union on my time." Brian Harris corroborated Twiss. Harris recalled that Smith told Twiss he was being fired "for promoting the union on my time."

¹⁴ Respondent alleged that it discharged Twiss because he was recruiting for the Union on Company time when Respondent had no rule prohibiting talking, soliciting or distributing during work time. Moreover, as shown above, Respondent contended during the hearing that additional factors including absenteeism, being out of his work area and interfering with other employees contributed to Twiss's discharge even though Superintendent Smith stated only one reason for Twiss's discharge when he discharged him.

¹⁵ Among other evidence the record proved animus through statements Franklin Smith made when he discharged Twiss as well as by the other unfair labor practices found herein.

In view of that evidence I do not credit Respondent's argument to the effect that Twiss's union activities had nothing to do with his discharge. The record shows what was on the mind of the decision-maker at the time he discharged Twiss. Franklin Smith discharged Twiss because he felt Twiss was recruiting for the Union and Smith said that to Twiss.

I am aware that employers are sometimes justified in discharging someone for violation of a lawful no solicitation rules. That is not the case here. The record showed that Respondent did not have a no-solicitation rule, or for that matter, any other rule, that lawfully prohibited employees including George Twiss, from soliciting for the Union.

Finally, I shall consider whether the credited record shows that Twiss would have been discharged because he interfered with other employees' work in the absence of union activity. In that regard Respondent argued that it did not matter what Twiss was saying in his discussions with other employees. Instead, only the fact that Twiss was interfering with others' work contributed to his discharge.

Respondent was left with only discredited testimony to support its argument. Respondent witnesses including Franklin Smith and Curtis Higbee testified to numerous warnings to Twiss for interfering with others' work. As shown above I did not credit that testimony. Instead I credited the testimony of George Twiss. Twiss testified that no supervisor or foreman ever told him that he was talking too much, or that he was leaving his work area too frequently.

Moreover, the record showed that it was not unusual for employees to be out of their work areas while on the TCH job. Foreman Tad Lee testified that he didn't recall reporting Twiss being out of his work area to anyone because that "was so rampant among many individuals". There was no showing that Respondent discharged any of those "many individuals" mentioned by Lee, other than George Twiss.

Twiss testified that on one occasion Franklin Smith along with Foreman Charles Gray talked to Twiss and employee Brian Harris. Smith told them that they needed to tighten up and that Smith did not think they had done enough on one particular project. However, Smith went on to say,

Well, don't get me wrong. You're doing a great job. Your work looks fine. You just need to do a little bit more of it.

As shown above, there was no documented evidence and there was no credited testimony that Twiss was ever disciplined before his September 14 discharge. Therefore, I find that Respondent's contention that Twiss was discharge because he interfered with other employees' work without regard to whether he was talking about the Union, was not supported by credited evidence. I find that the evidence failed to show that Twiss would have been discharged in the absence of his Union activity or in the absence of animus.

Discharge of Robert Fernandez:

Robert Fernandez's last day with Respondent was October 4, 2002. Fernandez wore a Union tee shirt to work that day for the second consecutive day. As Fernandez was gathering his tools at the end of the work day, Superintendent Franklin Smith came to him and said, "*Bob, I need to talk to you a minute. We're going to have to let you go.*" Fernandez asked if he was being laid off or fired and Smith responded, "*No. But, we're just going to have to let you go. You've done a fine job for us and all that but we're kind of catching up and it's time to let you go.*" Smith gave Fernandez two envelopes containing payroll checks. Franklin Smith said, "*We didn't think that you would take a reduction in pay so we're letting you go.*" Fernandez replied that he was willing to take a reduction. Smith stated, "We don't need you any more."

Fernandez testified that he asked Franklin Smith if he was being let go because of his union tee shirt or what. Smith looked at him but did not say anything regarding Fernandez's tee shirt.¹⁶

Franklin Smith had talked to Fernandez earlier about a pay reduction. In September Smith told Fernandez that Respondent wanted to keep people but "*we're going to have to reduce their pay, of course.*"¹⁷ Fernandez stated to Smith, "*I don't know. I don't think I can do that, you know.*" However, the next morning Fernandez told Foreman Tad Lee that he had changed his mind and that he would stay at reduced wages. He asked Lee to make sure Franklin Smith knew about his changed decision. Later that day Fernandez also told Job Superintendent Max Rischar that he had changed his mind and would take a pay cut to stay on.¹⁸

Fernandez has been a member of Local 435 for the last one and a half years. He started working for Respondent as a sheet metal mechanic on the TCH project in July 2002. His foreman was Tad Lee. Fernandez solicited other employees to sign union authorization cards while at work beginning in September 2002. He asked two employees to sign cards.

Robert Fernandez testified that he attended Union meetings on a couple of occasions while he worked for Respondent. The first meeting he attended was in September and there were about 25 to 30 people present. About half of those were TCH employees of Respondent. The second meeting attended by Fernandez was held about two weeks after the first. There were about 6 or 7 employees present and all of them worked for Respondent at the TCH project.

¹⁶ Smith testified that he did not notice what Fernandez was wearing.

¹⁷ The record showed that Respondent was forced to hire new sheet metal mechanics on the TCH project and that it was forced to pay them more than it had been paying sheet metal mechanics. Fernandez did not dispute that Franklin Smith spoke to him early during his time with Respondent, about staying on after the TCH job but at reduced pay.

¹⁸ Both Max Rischar and Tad Lee testified but neither disputed Fernandez's testimony that he told them he had changed his mind and would stay on for reduced pay.

When Fernandez had on a union tee shirts on the day before his discharge Fernandez asked Tad Lee what was wrong; you *"don't like the T-shirt?"* Lee replied, *"I really don't give a damn about the T-shirt."* Lee admitted that he noticed Fernandez wore a Union tee shirt. He testified that Hernandez pointed the shirt out to him on the day before Hernandez's last day with Respondent. Hernandez told Lee that he believed he would be fired because he was wearing a Union shirt. Lee testified that he responded to Hernandez, *"Oh, they don't care about that."*

Franklin Smith testified that he had no problems with Robert Fernandez's work. It was just that Fernandez did not turn out enough work for the amount of money he was making. Tad Lee testified that even though Fernandez was initially an excellent worker, his production dropped off. Job Superintendent Max Rischar testified that Fernandez appeared to really bust his butt for the first couple of weeks. Then he seemed to slow down and Rischar oftentimes saw Fernandez and his helper out of their work area. Rischar never had any problems with the quality of Fernandez's work and he never said anything to Fernandez about his production or about his being out of his work area.

Conclusions:

Credibility:

After consideration of the full record and the demeanor of the witnesses I credit the testimony of Robert Fernandez. I do not credit the testimony of Franklin Smith, Tad Lee and Max Rischar to the extent their testimony conflicted with credited testimony including that of Fernandez. I find especially unbelievable Smith's testimony that he did not notice that Fernandez was wearing a union tee shirt on the day he was terminated. I find that surprising especially in view of Foreman Tad Lee's admission that he noticed Fernandez wearing a union tee shirt.

Findings:

I shall consider whether the evidence shows that Respondent terminated Robert Fernandez because of its Union animus, and, if so, I shall consider whether Fernandez would have been terminated in the absence of Union activity.

As shown herein, Respondent harbored Union animus. As to Fernandez the evidence illustrated that Fernandez has been a Union member for a year and a half and he engaged in union activity on the TCH job by soliciting other employees to sign Union authorization cards. He attended Union meetings and he wore Union clothing to work. The evidence proved that Respondent was aware of Fernandez's union activities. Fernandez testified without rebuttal that he wore a Union tee shirt on the last two days he worked for Respondent. Tad Lee testified that he noticed Fernandez wearing a union tee shirt on the day before his termination.

Finally, the timing of Fernandez's discharge contributed to my findings. Fernandez wore a Union tee shirt on the day of and the day before his termination. Moreover, as shown above, Franklin Smith, was untruthful in his testimony regarding Fernandez wearing a union shirt on the day of his termination.

In view of that evidence, the full record and the evidence of Respondent's animus against the Union, I find that Respondent terminated Robert Fernandez because of its Union animus. With that in mind, I shall consider whether Fernandez would have been terminated in the absence of union activity.

Respondent contended that Fernandez was not terminated. Instead it argued that Fernandez turned down its offer to continue working for Respondent at reduced wages.

However, that defense was not supported by credited evidence.

The record was not in dispute but that Franklin Smith talked to Fernandez about Fernandez continuing to work for Respondent. Smith told Fernandez that Respondent wanted to keep people after the TCH job but Respondent would have to reduce their wages.¹⁹

Even though at one time Fernandez told Smith that he did not believe he could accept reduced wages, Fernandez changed his mind and told his foreman, Tad Lee, that he would continue working for Respondent for \$14.00. Fernandez also told Job Superintendent Max Rischar that he would continue working for Respondent even though it would entail a pay cut.

Finally, as shown by the credited testimony of Robert Fernandez, after telling Fernandez of his termination on October 4, Smith told Fernandez, "We didn't think that you would take a reduction in pay so we're letting you go." Fernandez replied that he was willing to take a reduction in pay but Smith replied to the effect that Fernandez was no longer needed.

I find that after initially telling Franklin Smith he could not accept a pay cut, Fernandez changed his mind and told both Foreman Tad Lee and Job Superintendent Rischar that he would take a pay cut. Thereafter, Fernandez told Smith that he was willing to take a pay cut at the time Smith said he was being released. That evidence shows that all Fernandez's supervisors knew that Fernandez was willing to continue working at reduced pay.

In view of the full record I find that Fernandez did not refuse to work for less pay. I find that Fernandez did not quit. Instead Franklin Smith discharged Fernandez on October 4.

Respondent also argued that Fernandez was too slow to justify continuing paying him \$18 an hour. However, the full record showed that Fernandez's production had

¹⁹ As shown herein, Respondent offered reduced wages to employees after the TCH project without regard to the employee's past performance. Respondent had paid lower wages until it was forced to hire additional mechanics on the TCH project at higher wage rates. Respondent talked to some TCH mechanics about staying after that project but at lower wage rates.

nothing to do with his termination. Instead Respondent contended that it was willing to continue working Fernandez at a lower wage.

5 Additionally, I find that Respondent never considered discharging Fernandez because of his production. At the time of his termination Franklin Smith said nothing to show unhappiness with either Fernandez's work or with his production and there was no evidence that Smith ever considered Fernandez's production as a reason for discharge.

10 I find that the record failed to show that Respondent would have discharged Robert Fernandez in the absence of his union activities.

Legal Conclusions regarding Twiss and Fernandez:

15 In view of my findings and the full record, I find General Counsel proved that Respondent was motivated by Union animus to discharge George Twiss and Robert Fernandez and I find that Respondent would not have discharged Twiss or Fernandez in the absence of their Union activity. **Wright Line**, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899(1st Cir. 1981), cert. denied 455 U.S. 989 (1982); **NLRB v. Transportation**
20 **Management Corp.**, 462 U.S. 393 (1983).

Conclusions of Law

25 1. By interrogating its employees about Union activities; by creating the impression that it was engaged in surveillance of its employees' union activities; by threatening its employees with discharge because of their union activities; by discriminatorily prohibiting its employees from discussing the Union while on its job; by soliciting its employees to revoke their union authorization cards and by threatening its employees with loss of job opportunities because of their union activities, Kelly Brothers
30 Sheet Metal, Inc. has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

35 2. By discharging and refusing to reinstate its employees George Twiss and Robert Fernandez, Respondent, Kelly Brothers Sheet Metal, Inc., violated Section 8(a)(1) and (3) of the Act.

Remedy

40 Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

45 The Respondent having discriminatorily discharged employees George Twiss and Robert Fernandez, it must offer Twiss and Fernandez immediate reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent jobs, and make Twiss and Fernandez whole for all lost earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less

any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

5 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁰

ORDER

10 The Respondent, Kelly Brothers Sheet Metal, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

15 (i) Interrogating its employees about Union activities.

(ii) Creating the impression that it is engaged in surveillance of its employees' union activities.

20 (iii) Threatening its employees with discharge because of their union activities.

(iv) Discriminatorily prohibiting its employees from discussing the Union while on its job.

25 (v) Soliciting its employees to revoke their union authorization cards.

(vi) Threatening its employees with loss of job opportunities because of their union activities.

30 (vii) Discharging and refusing to reinstate its employees because of their union activities.

35 (ix) In any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed you by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

40 (i) Within 14 days from the date of this Order offer immediate reinstatement to George Twiss and Robert Fernandez to their former jobs, or, if those jobs no longer exist, to substantially equivalent jobs and make Twiss and Fernandez whole for all lost pay and other benefits suffered since their discharges.

²⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(ii) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of George Twiss and Robert Fernandez and within 3 days thereafter notify Twiss and Fernandez in writing that this has been done and that their discharges will not be used against them in any way.

(iii) Within 14 days after service by the Region, post at its facility or office in Tallahassee, Florida copies of the attached notice marked "Appendix."²¹ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 2002.

(iv) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

Pargen Robertson
Administrative Law Judge

²¹ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "**POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD**" shall read "**POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.**"

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT unlawfully interrogate our employees because of their protected and union activities.

WE WILL NOT create the impression that we are engaged in surveillance of our employees' activities on behalf of **Sheet Metal Workers' International Association Local Union No. 435, AFL-CIO**, or any other labor organization.

WE WILL NOT threaten to discharge our employees because of their union activities.

WE WILL NOT discriminatorily prohibit our employees from discussing the Union while on their jobs.

WE WILL NOT solicit our employees to revoke their union authorization cards.

WE WILL NOT threaten our employees with loss of job opportunities because of their union activities.

WE WILL NOT discharge or fail to properly reinstate any of our employees because of their union activities.

WE WILL offer George Twiss and Robert Fernandez immediate reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent jobs.

WE WILL make George Twiss and Robert Fernandez whole for all lost wages and other benefits incurred by them since their discharges.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of George Twiss and Robert Fernandez and **WE WILL**, within 3 days thereafter, notify Twiss and Fernandez in writing that this has been done and that his discharge will not be used against him in any way.

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KELLY BROTHERS SHEET METAL, INC.
(Employer)

Dated: _____

By: _____
(Representative) (Title)

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The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

40

South Trust Plaza – Suite 530, 201 East Kennedy Blvd., Tampa, FL 33602-5824
(813) 228-2641, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

45

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228-2662.

